



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: American Nuclear Corporation--Reconsideration
File: B-228028.2
Date: February 11, 1988

DIGEST

Prior decision dismissing protest of subcontract awarded by a government prime contractor is affirmed where the award was not by or for the government.

DECISION

American Nuclear Corporation (ANC) requests reconsideration of our decision in American Nuclear Corp., B-228028, Nov. 23, 1987, 87-2 CPD ¶ 503, dismissing ANC's protest of an award by M-K Ferguson Company of a contract to Umetco Minerals Corporation under request for proposals No. RIV-87-02. We dismissed ANC's protest because it did not concern a contract awarded by a federal agency. We affirm our decision.

The contract awarded to Umetco is for construction work involving the removal and disposal of mill tailings, or residue, at an inactive uranium mill near Riverton, Wyoming. Under Title I of the Uranium Mill Tailings Control Act of 1978, 42 U.S.C. §§ 7901-7925 (1982), the Department of Energy (DOE) is required to take remedial action to stabilize and control mill tailings at a number of specified sites. In 1983, DOE contracted with M-K Ferguson's parent company for engineering, design, construction, and inspection services necessary to accomplish remedial action at several sites, including Riverton. In 1987, M-K Ferguson subcontracted with Umetco for performance of the construction work after the firm had received and evaluated competitive proposals from both ANC and Umetco. ANC protested to

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this Office that the procurement was flawed in a number of respects.^{1/}

As explained in our prior decision, this Office will consider a protest of an award of a subcontract by a government prime contractor only when the subcontract award is "by or for the government." Bid Protest Regulations, 4 C.F.R. § 21.3(f)(10) (1987). Basically, a contract is considered to be by or for the government where the circumstances are such that the prime contractor essentially is acting as a conduit between the government and the subcontractor. We dismissed ANC's initial protest because it did not appear that the subcontract award to Umetco was by or for DOE.

ANC argues that our dismissal of its protest was improper because it was based on two alleged errors of fact. First, ANC contends that our prior decision was based on the erroneous finding that, in ANC's words, "the Department of Energy is not operating and managing a government facility because it does not own the land at the Riverton site." ANC points out that DOE controls the Riverton site in furtherance of its statutory responsibilities and contends that the agency has "beneficial" if not record ownership of the site. The firm argues that DOE indeed is operating and managing a government facility. Second, ANC contends that we misread M-K Ferguson's contract with DOE as allowing the firm to choose whether to perform the work itself or to have it performed by a subcontractor.

With regard to the first of the alleged errors, a subcontract may be considered by or for the government if it is awarded by a prime contractor operating and managing a facility owned by the government. Westinghouse Electric Corp., B-227091, Aug. 10, 1987, 87-2 CPD ¶ 145. In our prior decision, we concluded that DOE does not own the Riverton site; we reached our conclusion without regard to which of the parties may be responsible for its operation and management.

To the extent that ANC questions our finding with respect to ownership of the Riverton site, we are not persuaded that our prior decision was in error. While we appreciate DOE's

^{1/} We indicated in a footnote in our prior decision that although the protest was not within the jurisdiction of this Office we had found nothing in the record that, in our view, would require upsetting the award to Umetco. ANC has not addressed that conclusion in its request for reconsideration.

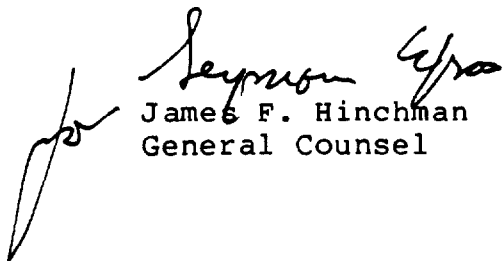
significant statutory responsibilities concerning remedial action at Riverton and its considerable control over operations there, these circumstances do not mean that the federal government should be considered as owning the Riverton site. Rather, the record clearly establishes that, at least while remedial action is being conducted, and perhaps afterward, the site will be owned by the State of Wyoming, not DOE. Further, while ANC argues that DOE operates and manages the site, this merely reinforces our conclusion that Riverton is not a contractor-operated facility. See Ocean Enterprises, Ltd., 65 Comp. Gen. 585 (1986), 86-1 CPD ¶ 479, aff'd, 65 Comp. Gen. 683 (1986), 86-2 CPD ¶ 10. As we noted in our prior decision, M-K Ferguson does have management responsibilities, but this appears to constitute only 10 percent of the total contract effort.

With regard to the second alleged error, we said in our prior decision that DOE's contract with M-K Ferguson does not require or prohibit the subcontracting of any of the work. ANC, however, cites a clause contained in DOE's contract with M-K Ferguson providing that DOE's preferred method of performance is for the firm to accomplish any required construction tasks through competitive subcontracts to the maximum extent possible. This clause was inserted in order to avoid the organizational conflicts of interest that might exist in those situations where M-K Ferguson would be responsible for both performance and inspection of the work. ANC argues that M-K Ferguson "is therefore not precluded from being a mere conduit for the government."

The cited contract clause, however, is not necessarily inconsistent with the statement in our decision that the contract does not require or prohibit the subcontracting of any of the work. In any event, the point of the discussion in which that statement was contained was that even though M-K Ferguson might subcontract for performance of some of the work required under its contract with DOE, M-K Ferguson remains responsible for all of the work and is not acting merely as a conduit between DOE and remedial action subcontractors. We remain convinced that our understanding of M-K Ferguson's role as the principal remedial action contractor is correct. From our review of the record as a whole, it appears to us that rather than requiring M-K Ferguson to act as a conduit or middleman, the DOE contract places sole responsibility for contract performance on M-K Ferguson. In this connection, we note that in approving M-K Ferguson's subcontract with Umetco, DOE specifically stated that its consent in no way relieved M-K Ferguson of its contractual obligations, nor did it create any obligations to Umetco on the part of the government. Thus, even though

M-K Ferguson may be required to use subcontracts whenever possible, such subcontracts are not "by or for" the government.

Our prior decision is affirmed.



James F. Hinchman
General Counsel